

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. V-04/08-155
)
 Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families substantiating a report that the petitioner sexually abused his younger half-brother in 1989. The issue is whether the Department's decision is supported by a preponderance of the evidence. The following findings of fact are based on the testimony and other evidence admitted at a hearing in this matter held on March 12, 2009.

FINDINGS OF FACT

1. In or around January 1992 the Department received a report that a twelve-year-old boy had alleged that the petitioner, his older half-brother, had sexually abused him three years before, in 1989. At the time, the alleged victim was in the Department's (then SRS) custody pursuant to a delinquency proceeding resulting from that child's sexual abuse of a younger girl.

2. The primary basis of the Department's substantiation was an allegation the twelve-year-old boy made during a

"psychosexual consultation" performed on October 5, 1992 by a psychologist pursuant to the boy's admission into a court-ordered sexual abuse treatment program. During that evaluation the boy disclosed, inter alia, that the petitioner had forced him to "have sex".

3. At the hearing in this matter the alleged victim, who is now twenty-nine, testified that he had lied to his interviewers at that time. He stated that he was in SRS custody then and had been taken from his family's home. He says he told investigators "what they wanted to hear" in order to be able to return to his family. He stated that he felt pressured by the interviewer to implicate other family members, so he made it up in order to be able to "stop talking about it". His present testimony, in essence, is that he made his allegations of having been forced to have sex with the petitioner in order to mitigate and deflect the abuse charges that had been brought against him (which he admits) because he "wanted to go home".

4. The investigator who worked for SRS at that time (but who now is in another line of work) testified at the hearing that she has no independent recollection of her investigation. The Department proffered that the information

in her 1992 written summary of her investigation is similar to the disclosures the boy had made to the psychologist.

5. Based on the alleged victim's demeanor at the hearing it cannot be found that his recantation is not credible.

ORDER

The Department's decision substantiating the report of sexual abuse is reversed.

REASONS

The Department is required to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

Any person against whom a report of abuse is substantiated by DCF may appeal to the Human Services Board. In such cases the burden of proof is on the Department. 33 V.S.A. § 4916b.

The statutory sections relied upon by DCF in this matter include the following:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In this case, there is no question that the acts described by the alleged victim in 1992, if they occurred, constituted sexual abuse by the petitioner within the meaning of the above provisions. However, in a *de novo* hearing the Department's burden of proof is to establish the facts by a preponderance of evidence. In determining whether this burden is met, the relative credibility of the witnesses is crucial, especially when, as here, the Department's case is

based solely upon hearsay evidence that has been totally and unequivocally recanted.

As noted above, the alleged victim's testimony at the hearing that in 1992 he had essentially fabricated the allegations against the petitioner was not deemed to be incredible. Thus, it cannot be concluded that the Department has met its burden of proof in the matter. Therefore, the Department's decision substantiating the report in question as one of sexual abuse must be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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